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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PETITION NOT PRINTED
RESPONSE NOT PRINTED

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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ERNESTO A. MIRANDA,

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vs.

THE STATE OF ARIZONA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

Opinion

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 98 Ariz. 18, 401 P. 2d 721, and reprinted R. 72.

Jurisdiction

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a criminal case, entered on April 22, 1965, which became final on May 7, 1965. The petition for writ of certiorari, filed in July of 1965, was granted on November 22, 1965, and the case, in forma pauperis, was placed on the appellate docket and summary

calendar. The issue is whether the conviction of petitioner violates his constitutional rights under the Sixth and Fourteenth Amendments to the Federal Constitution. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions Involved

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S.C. Const. Amend. VI.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. XIV, Sec. 1.)

Question Presented

Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be

admitted into evidence over specific objection based on the absence of counsel?

Statement

A. Proceedings on Interrogation and Trial.

Petitioner was charged with having kidnapped and raped an eighteen year old girl in the vicinity of Phoenix, Arizona, on March 3, 1963.

A psychiatric report, made by a court-appointed psychiatrist (R. 6-9), gives the background of petitioner. Miranda, an indigent, was 23 years old at the time of the interrogation, and working as a truck driver and warehouseman. He had completed eighth grade and started on ninth grade before dropping out of school. Petitioner has a considerable sexual preoccupation, as illustrated in his interpretation of certain proverbs;[1] he has been involved in a series of sex offenses. The doctor concluded that petitioner "has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type" (R. 9).

Petitioner was, at the time of his apprehension, suspected of another, wholly unrelated crime. That incident, the robbery of a woman, may also have involved a threat of rape. The robbery occurred several months before the instant episode (R. 6-7). On March 13, 1963, defendant was arrested at his home and taken in custody to the police station where he was put in a lineup consisting of four per-

[1] "A rolling stone gathers no moss" is interpreted by Miranda to mean "if you don't have sex with a woman, she can't get pregnant." The proverb "people in glass houses shouldn't throw stones" is interpreted by Miranda to mean, "a person with one woman shouldn't go to another woman." Apart from this preoccupation, petitioner also believes that "a stitch in time saves nine" means "if you try to shut something in, you keep it from going out" (R. 8-9).

sons.[2] He was there confronted and identified by the two complaining witnesses, the one for robbery and the other for rape. Miranda was then taken to Interrogation Room 2 at the local police headquarters (R. 37) and there interrogated on both matters.

The two matters were at first consolidated in the trial court, with one sanity examination covering both, but were later separated for trial. (See report in 401 P. 2d at 718.) The petitioner was convicted of both offenses in separate trials. The two cases were treated by the Supreme Court of Arizona as companions; *State* v. *Miranda*, 98 Ariz. 11, 401 P. 2d 716 (not this case) and 98 Ariz. 18, 401 P. 2d 721 (this case), both decided on April 22, 1965.

Only the kidnapping-rape case has been brought here. However, since the interrogation was joint, some reference needs to be made to the other record, and, with the consent of opposing counsel, an extract has been tendered to this Court. It is reprinted as an appendix to this brief and is the basis of this paragraph. After the lineup, it was Officer Cooley, who had arrested Miranda, who took petitioner to Interrogation Room 2. There he and Officer Young conducted the questioning. Officer Young did not tell Miranda that anything he said would be held against him, nor did he tell Miranda of his right to consult an attorney (Appendix, reproduction of Transcript, p. 48). Officer Young believes that Miranda was told that he need not answer their questions (Appendix, reproduction of Transcript, p. 60) but no mention was made of the right to counsel.

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[2] See R. 37, 38 where police officers refer variously to custody and arrest. Under Arizona law, custody is arrest; see Rule 14, Arizona Rules of Criminal Procedure, Vol. 17, Ariz. Rev. Stat. p. 175; and Ariz. Rev. Stat. Sec. 13-1401.

The absence of advice to petitioner regarding his right to counsel is amplified by the record in the instant case. Here, Officer Cooley also testified as to interrogation in Room 2 of the Detective Bureau (R. 37), and narrated extensively a confession he attributed to the petitioner (R. 38-40). A written statement,[3] obtained from Miranda while he was under the interrogation in Room 2, was then put into evidence (R. 40, R. 69). Officer Young confirmed that defendant was not told of any right to advice of counsel (R. 45). When the confession was offered into evidence, defense counsel expressly objected "because the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest." The confession was admitted over this objection (R. 41). In summation, the prosecutor emphasized to the jury the officer's testimony as to the interrogation, and the written confession (R. 50-51).

The two cases, the robbery and the rape-kidnapping, were tried by this same judge. In the instant case Miranda was given a sentence of twenty to thirty years, and in the robbery case he was given a sentence of twenty to twenty-five years. He thus faces imprisonment of forty to fifty-five years.

B. Proceedings in the Arizona Supreme Court.

The Arizona Supreme Court, setting forth the language of both the oral and the written confessions at length (R.

[3] The written confession says, "I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about ½ (half) inch in." It strains credulity to the breaking point to believe that this sentence was the product of a man of petitioner's mentality and comprehension as indicated by his answers to the questions set forth in footnote 1.

79-82), considered the admissibility of the confessions under the decisions of this Court. It held that *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) was "a controlling precedent" only where five elements occur, one of which is that "The suspect must have requested and been denied the opportunity to consult with his lawyer" (R. 87). This element being absent, the court held that:

> "[N]otwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence" (R. 93).

Accordingly, Miranda's conviction was affirmed.

Summary of Argument

There is a right to counsel for arrested persons when interrogated by the police. The law has been growing in this direction for more than thirty years. The federal experience from *Johnson* v. *Zerbst*, 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938) through the series of cases culminating in *Mallory* v. *United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957), and the Public Defender Act of 1964 (78 Stat. 552, 18 U.S.C. Sec. 3006A), and applying Federal Criminal Rules 5 and 44, amount to a requirement that all defendants be informed of their right to counsel and be given counsel swiftly upon their arrest. In the states, *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932) asserted as a constitutional requirement of state procedure that a person charged with a capital crime have "the guiding hand of counsel at every step in the proceedings against him." 287 U.S. at 69. This

requirement was buttressed by repeated decisions of this Court that it would accept no forced confessions, *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), or those obtained in such circumstances that the exclusion of "friends, advisers, or counselors" made it highly likely that force was used, *Chambers* v. *Florida*, 309 U.S. 227, 238, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

The right to counsel remained in some suspense during the period governed by *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942), but during the years following *Betts*, the views were rapidly developed by just short of a majority of this Court that secret confessions obtained without counsel between arrest and arraignment were invalid; *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); *In re Groban's Petition*, 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957). This view had the support of four Justices of the present Court in *Crooker* v. *California*, 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958); *Cicenia* v. *La Gay*, 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958).

When the right to counsel was recognized at the arraignment period, *Hamilton* v. *Alabama*, 368 U.S. 52, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961), and for all crimes at trial, *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963), and when it was recognized that the privilege against self-incrimination applied to the states as well as the federal government, *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), any view that counsel was not required for interrogation became untenable. Hence counsel was required for interrogation at least where requested in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964); and the fact that a request

happens to have been made at that particular case cannot be controlling for *Carnley* v. *Cochran*, 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962) held that the right to be furnished counsel does not depend upon a request.

We therefore urge upon the Court that line of cases interpreting *Escobedo* which holds that there is a right to counsel during the interrogation period for any person under arrest; *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965); *Wright* v. *Dickson*, 336 F. 2d 878 (9th Cir. 1964); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

We deal with the basic principle, the principle expressed by Justice Douglas in his concurring opinion in *Culombe* v. *Connecticut*, 367 U.S. 568, 637, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), that "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This constitutional principle is not incompatible with proper law enforcement. It will have no effect on organized crime, whose members know the method of combat with society all too well; the principle here advocated as a practical matter of solid experience applies primarily to the poor, the ignorant, and frequently, those of limited mental ability. The right to counsel under public defender systems may well be costly, but the dollar cost of preservation of a constitutional right is no reason for ignoring that right.

The larger problem is whether extending the right to counsel into the interrogation period will unduly handicap the police in their work. Numerous reports of actual experience are analyzed in the brief to show that this hazard need not be heavily weighed. Concrete experiences for vari-

ous cities are reported including the observation of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit who had been Detroit's police commissioner in 1962 and 1963. Judge Edwards attempted to apply "Supreme Court standards." He found no ill effects and much benefit. A review of actual experience shows that third degree abuses are not some remote fantasy; they happen now, and so does wrongful detention without charge and without counsel. These things occur in great numbers in today's United States. They are practices which, as the scrupulously meticulous Horsky Report for the District of Columbia concludes, "arrest for investigation should cease immediately."

At best, as a practical matter, confessions obtained from ignorant persons without counsel are the product of skilled leading by trained prosecutors or investigators. See the opinion of Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125 (D. Conn. 1960). Even without physical abuse, confessions are obtained by means wholly unworthy of free people. The evil of the "led confession" is particularly apparent in the instant case in which the defendant was clearly led into assertions which only dubiously originated with him, and without which would have led to his conviction for a grave but lesser offense.

When this defendant went into Interrogation Room 2, instead of having "the guiding hand of counsel" to which we believe the principles of *Powell* v. *Alabama* entitled him, he had the guiding hand of two policemen. When he came out of Interrogation Room 2, there was no longer any point in giving him counsel—his case was over. We believe that such practices are barred by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Argument

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas' observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California*, 357 U.S. 433, 444-45, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) (dissenting opinion).

The question presented is whether a defendant in such circumstances is entitled to be told of his right to counsel and to have a meaningful opportunity to consult counsel before the law disposes of him. For "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Justices Douglas, Black, and Brennan in *Spano* v. *New York*, 360 U.S. 315, 326, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

I.

There Is a Right to Counsel for Arrested Persons When Interrogated by the Police.

We deal here with growing law, and look to where we are going by considering where we have been. The existence of a right to counsel of any sort at any time did not exist in medieval England; Plucknett tells us that not until the 15th Century was counsel allowed to argue points of law; that in 1695 counsel was allowed in treason trials; and that not until 1836 was counsel allowed in felony cases.[4]

While English statutes did not provide for counsel in felony cases before 1836, in practice counsel did participate in English criminal trials before the American Revolution.[5] This is of consequence in understanding early American constitutional and statutory provisions of substantially the same vintage as the Bill of Rights. Many of these expressly or in practice asserted a right to counsel (New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Maryland, North Carolina, Georgia), and some of them even at that early time required that appointed counsel be made available (Connecticut, New York (*dubitante*), Pennsylvania, New Jersey, Delaware, and South Carolina).[6] Speaking broadly, therefore, the Sixth Amendment was in general accord with the English and American practice of its time: "In all criminal prosecutions, the accused shall

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[4] Plucknett, *A Concise History of the Common Law*, 385-86 (2d ed. 1936), citing for the 1837 development to 6 & 7 Will. IV, c. 114.

[5] Comment, *An Historical Argument* [*etc.*], 73 Yale L.J. 1000, 1027-28 (1964); and see historical analysis in *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

[6] *Id.*, appendix, 73 Yale L.J. at 1055-57.

enjoy the right . . . to have the assistance of counsel for his defence."

Sixth Amendment problems came to the Court surprisingly late, both as to federal and state procedure.

A. Federal Experience.

The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938). In that case, petitioner, without counsel, had been convicted of counterfeiting. There was a conflict as to whether or not he had asked for counsel. The decision decisively establishes as an "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . . " 304 U.S. at 462-63. The opinion, quoting from *Powell* v. *Alabama,* 287 U.S. 45, 68, 69, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932), repeats that a defendant " 'requires the guiding hand of counsel at every step in the proceedings against him.' " 304 U.S. at 463. Hence in *Johnson* v. *Zerbst,* the Court declared that "the Sixth Amendment withholds from Federal Court, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel." *Ibid.*[1]

The Court further declared that "since the Sixth Amendment constitutionally entitled one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential judicial prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* at 467.

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[1] The case also considered the subject of waiver, a matter we do not develop here because there is no waiver question in the *Miranda* case, there being no suggestion that the defendant had the faintest notion of any right to counsel.

The requirements of *Johnson* v. *Zerbst* were carried into effect by Rules 5 and 44 of the Rules of Criminal Procedure. Rule 5 expressly provides that any arrested person should be taken "without unnecessary delay before the nearest available commissioner" who is to tell the accused both of his right to stand silent and of his right to counsel. Rule 44 confirmed this provision by providing for appointment of counsel if need be. But it should always be remembered that these rules were simply manifestations of the Sixth Amendment as declared in *Johnson* v. *Zerbst.*

Rule 5 with its provision for arraignment "without unnecessary delay" became the battleground for the immediate issue now before the Court. If the defendant is brought before the commissioner instantly, he cannot be interrogated before being informed of his right to counsel. On the other hand, if the period pending presentment is protracted, the right to counsel can, as in the instant case, be made meaningless because the defendant may be in such a position before the arraignment that a combination of Clarence Darrow and John W. Davis reincarnated could do him no good. In *McNabb* v. *United States,* 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 219 (1943), the issue was whether a confession should be excluded which was obtained in the course of an extended interrogation. The defendants "had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance." 318 U.S. at 335. This Court, taking up the matter from the standpoint of "civilized standards" of justice, *id.* at 340, found that the procedure followed "tends to undermine the integrity of the criminal proceeding." *Id.* at 342. The Court, analyzing the proper division of functions in criminal law enforcement, declared that proper procedure "aims to avoid all the evil implica-

tions of secret interrogation of persons accused of crimes." *Id.* at 344.

McNabb scrupulously avoids constitutional interpretation, restricting itself to a matter of proper federal practice. The *McNabb* rule was not applied in *United States* v. *Mitchell,* 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944) where the confession was held to be so immediate that it was construed to be spontaneous. However, the rule was applied again in *Upshaw* v. *United States,* 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), a case in which the defendant confessed during a thirty-hour detention. The Court in *Upshaw* stressed that the object of the *McNabb* rule and of Rule 5 was to "check resort by officers to 'secret interrogation of persons accused of crime.'" 335 U.S. at 412. The matter of obtaining counsel was considered by the dissent, which observed that the practical effect of speedy application of the rule was that "prompt hearing gives an accused an opportunity to obtain a lawyer," with all of the consequences of giving legal advice to "the illiterate and inexperienced." 335 U.S. at 424.

The matter was again reviewed in *Mallory* v. *United States,* 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957). In *Mallory,* the defendant, like the defendant here, was charged with rape. He was interrogated for about ten hours after his arrest, the inquiry going deep into the night, at the end of which he made a confession. The next morning he was brought before a commissioner. The Court noted that the Criminal Rules were adopted "since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree;'" and that therefore the police could detain a person only until "a committing magistrate was readily accessible." 354 U.S. at 453.

The Court held that the time interval permitted between arrest and presentation to a magistrate was intended to give "little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." It added that a person was to be arraigned "as quickly as possible so that he may be advised of his rights . . . But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 453-54. The Court noted that the defendant had not been "told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent . . . " *Id.* at 455. The opinion concluded "it is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Id.* at 456.

Mallory was the unanimous expression of this Court. Once again the case did not formally involve a constitutional issue, but rather the interpretation of the rules of criminal procedure. Unlike its predecessor, the opinion did not refer to constitutional standards. Nonetheless, *Mallory*, by its express recognition of the legitimate need for counsel during the interrogation, went far to establish for the federal system the principle here advocated.

B. The Constitutional Principles Applied to State Criminal Proceedings; the Development to Escobedo.

The development of constitutional doctrine as applied to state proceedings can be grouped around three key decisions, *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77

L. Ed. 158 (1932); *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942); and *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963).

(a) *The Powell period (1932-1942).*

Powell is too familiar to warrant restatement. In this famous rape case, counsel was appointed but exercised only a nominal function, permitting defendants to be hustled to trial. The function of counsel was described as "pro forma." The Court held that:

> "defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities. . . . The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result the defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." 287 U.S. at 58-59.

This Court in *Powell* recognized that the right to counsel was a growing, not a static, constitutional right. It refused to be guided by the standards of England at the time the Constitution was adopted, following instead the more liberal practice of the various colonies. The right to counsel was held to be one of those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " *id.* U.S. at 67, quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926); it was expressly held to be an integral part of the right to a fair hearing. This led Justice Sutherland to the classic passage: the person charged with the crime "requires the guiding hand of counsel at every step in the proceedings

against him." This said the Court, was true for men of intelligence and even more true for "the ignorant and illiterate, or those of feeble intellect." 287 U.S. at 69. The trial court therefore must first give the defendant the right to employ counsel, and second, if need be, must appoint counsel. The Court made no decision as to non-capital cases, but as to capital cases it held that:

> "where the defendant was unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Miranda strikingly parallels the *Scottsboro* case; here, as there, the defendant did not have counsel "at such times or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Immediately after *Powell*, the right to counsel cases began to relate directly to the forced confession cases; as this Court said in *Mallory, supra*, secret interrogation, which is interrogation without counsel, tends to slide into the third degree. Thus in *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), the leading confession by torture case, the Court mentioned *Powell* as illustrative of the principles of basic justice, observing that "the state may not deny to the accused the aid of counsel." In *Brown*, trial counsel failed to make proper objections to confessions obtained by violent beating. In *Chambers* v. *Florida*,

309 U.S. 227, 60 Sup. Ct. 472. 84 L. Ed. 716 (1940), a long additional step was taken. In *Brown,* it was indisputable that physical violence had been applied to the defendants. In *Chambers* there was a factual dispute as to whether or not there had been physical compulsion. This Court nonetheless held that the protracted questioning, in all of the circumstances, banned the confession under the Fourteenth Amendment, noting that the defendants had been held and interrogated "without friends, advisers, or counselors." 309 U.S. at 238.

The state of the law as it stood in relation to right to counsel and confessions in 1940 may fairly be summarized as follows:

In the federal courts there was an absolute right to counsel in criminal cases. In the state courts there was an absolute right to counsel, and appointed counsel at that, at least in capital cases, the matter being reserved as to non-capital cases. A confession obtained by force could not be used, and a confession obtained by protracted interrogation where there was an unresolved dispute as to force, and where the defendant had been interrogated, among other things, "without counselors" denied due process. There was, however, an ambiguity left open by the *Powell* case. The Court had declared in *Powell* that a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him;" but there had not yet been resolved the question of whether "every step in the proceedings" really meant "every step in the proceedings," which would include interrogation, or whether, despite the broad sweep in the language, something less was intended.[8]

[8] This summary does not take account of *Lisenba* v. *California,* 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941). *Lisenba* in-

(b) *The Betts period (1942-1963).*

Betts, like *Powell,* is too familiar to need restatement. The case held, in its chief conclusions, that while counsel was required in capital cases and in some undefined other cases, it was not required in all cases. But on the way to reaching that decision, *Betts* also decided one other point of great importance in the instant case. It expressly recognized that under the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra,* appointed counsel was required "in all cases where a defendant is unable to procure the services of an attorney." 316 U.S. at 464. It thereupon examined the question of whether Sixth Amendment principles should in fact be imported into the interpretation of the Fourteenth Amendment. This vital question is answered in the negative, thus laying the foundation for the particular conclusion *Betts* reached. Justices Black, Douglas and Murphy dissenting did so expressly on the ground that the Sixth Amendment is applicable to state criminal proceedings, the view adopted twenty years later in *Gideon.*

During the reign of *Betts,* the confession cases turned on "special circumstances," as is illustrated in the citations

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volved a confession obtained upon protracted interrogation. The majority noted expressly that "counsel had been afforded [the petitioner] and had advised him." Apparently petitioner saw his attorney as much as he wished up to the critical day of his interrogation and confession. 314 U.S. at 230-31, 240. Hence the majority, in upholding the use of the confession, expressly noted that this was not a case in which he had been interrogated "without the advice of friends or of counsel;" (*id.* at 240) and the Court further observed that if a person held were incommunicado, subject to questioning for a long period, "and deprived of the advice of counsel," (*ibid.*) it would inspect the matter with great care. On the other hand, the dissent shows that the defendant was without counsel on the critical confession day, 314 U.S. at 242. In view of these specialized facts, we put the case aside in considering the immediate problem.

in the concurring opinion of Justice Clark in *Gideon* v. *Wainwright*, 372 U.S. at 347-49. This same specialized notion of the circumstances applied also to the right to counsel as it related to the interrogation. An example is *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948). In this case a fifteen year old boy was interrogated for five hours before he confessed to murder. The judgment of the Court reversing the conviction was announced by Justice Douglas, and joining with him in an opinion were Justices Black, Murphy and Rutledge. This opinion particularly stressed that "at no time was this boy advised of his right to counsel." Noting the youth of the defendant, the opinion said:

> "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.
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> "This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." 332 U.S. at 600.

It was asserted that the petitioner had signed a confession, and that the signed confession asserted that he knew fully of his rights. Said these four Justices: "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions." *Id.* at 601. The four Justices made clear that they were not announcing a principle simply for boys in custody, but one which applied equally to any defendant: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Ibid.*

We assume that the opinion in *Haley,* had it been of five Justices, would totally control in the instant situation. The interrogation, though at an odd hour, was relatively brief, and the opinion, emphasizing the necessity of counsel, tells us that the same principles apply to adults. But there were not five. Justice Frankfurter concurred specially, also noting the interrogation without counsel carries temptations for abuse. *Id.* at 605. He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question. The dissenting Justices were apparently content that the boy had not asked for counsel before his arraignment.

In 1957, two new voices were added in this Court on the right to counsel at the interrogation state. The case was *In re Groban's Petition,* 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957), in which the issue was the validity of an inquiry by the Ohio State Fire Marshal into the cause of a fire, the inquiry involving compulsory testimony

without presence of counsel. The majority opinion, by Justice Reed on his last day on the Court, found distinctions because this was an administrative hearing and therefore did not reach the principal question. Justice Black, for Chief Justice Warren and Justices Douglas and Brennan, did. What was said by those four Justices there synthesizes everything we have to say in the instant case (352 U.S. at 340-44). At any secret hearing,

1. "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. . . ."

This hazard is diminished by having the public or suspect's counsel present.

2. "Behind closed doors he [the defendant] can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will." *Id.* at 341-42.

3. "Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

4. "I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use

legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him."

5. "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

These same dissenting Justices expressed their views again in *Crooker* v. *California,* 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) and *Cicenia* v. *La Gay,* 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Crooker confessed during interrogation after he had asked for counsel and it was refused him. The Court, in passing upon the admissibility of the confession, concluded that the sole real issue was whether he had been coerced by the denial of his request for counsel. Citing various cases to the effect that confessions made prior to State appointment of counsel are not thereby rendered involuntary, the Court upheld the conviction. Applying the special circumstances test, it concluded that the particular petitioner was able to take care of himself without counsel at that stage. The Court held that State refusal of a request to engage counsel was a denial of constitutional rights "if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness. 357 U.S. at 439. This, it was held, depended on the circumstances of the case. The Court rejected the view, as having a "devastating effect on enforcement of criminal law," that police question-

ing, fair as well as unfair, should be precluded until the accused is given an opportunity to call his attorney. *Id.* at 440.

Justice Douglas, for Chief Justice Warren and Justices Black and Brennan, gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage, first to avoid the third degree, second because of the impossibility of determining disputes over what actually happened in the secret chamber, and finally, because of the importance of pretrial period. These Justices adopted the view that " 'the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial.' " *Id.* at 445-46. They also adopted the statement of Professor Chafee, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." *Id.* at 446. Adopting the views of *Powell* v. *Alabama* and the views of the dissent of *In re Groban's Petition*, both *supra*, this opinion concluded that "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." *Id.* at 448.

Cicenia involved similar issues. The defendant, before his indictment, was interrogated at the police station. He wanted counsel then and his family wanted to provide it, but the police did not permit the petitioner to meet with his lawyer or his family until after they had the confession. A majority rejected the view "that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved." 357 U.S. at 509. The same

dissenters as in *Crooker* (except Justice Brennan, not participating) disagreed; they believed that *Cicenia* was "the occasion to bring our decision into tune with the constitutional requirement for fair criminal proceedings against the citizen." *Id.* at 512.[9]

Soon after *Crooker* and *Cicenia*, the tide which was to overrule *Betts* began to flow with new vigor. In *McNeal* v. *Culver*, 365 U.S. 109, 81 Sup. Ct. 413, 5 L. Ed. 2d 445 (1961), Justices Douglas and Brennan called outright for the overruling of *Betts*. In *Culombe* v. *Connecticut*, 367 U.S. 568, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), Justices Frankfurter and Stewart, applying the particular circumstances approach, held that a confession should not be admitted. Those Justices pointedly rejected the view that all persons under interrogation should be entitled to counsel. Observing that "Legal counsel for the suspect will generally prove a thorough obstruction to the investigation," 367 U.S. at

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[9] Another case of this special circumstances type is *Reck* v. *Pate*, 367 U.S. 433, 81 Sup. Ct. 1541, 6 L. Ed. 2d 948 (1961). Justice Douglas concurring said, "I would hold that any confession obtained by the police while the defendant is under detention is inadmissible unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel." 367 U.S. at 448. See also *Spano* v. *New York*, 360 U.S. 315, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959), in which the defendant had been indicted and thereafter confessed without counsel. Chief Justice Warren for the Court said that the "abhorrence of society to the use of involuntary confessions" among other things "turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 360 U.S. at 320-21, footnote 2 on 321 summarizing the confession cases from *Brown* to this point. Justices Douglas, Black and Brennan, concurring, held that after indictment certainly the Government can never interrogate the accused in secret when he has asked for his lawyer. Justice Stewart, concurring, rested heavily on the fact that this defendant was under indictment.

580, their opinion reviewed the practice of other countries and again observed that the *McNabb* principles had not been applied to state cases. Justices Douglas and Black wished to rest frankly on the principle "that any accused —whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused," his constitutional rights are violated. *Id.* at 637. While an attorney may tell a defendant of his constitutional right not to testify, these Justices felt that all defendants are entitled to know their constitutional rights.

At the end of the *Betts* period, the condition of the constitutional law on the right to counsel at trial or during interrogation and the meaning of that right was this: a majority of this Court, so far as decisions were concerned, either had participated in *Betts* or had not yet disapproved it. The state of the law therefore was while a person was entitled to counsel of his choice in every case, *Chandler* v. *Fretag,* 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4 (1954), he was not yet entitled to appointed counsel at actual trial in every case. He was entitled to counsel in all federal cases; he was entitled to counsel at trial in all state capital cases; and he was entitled to counsel at trial in all other cases dependent upon special circumstances. This right in capital cases extended also to the arraignment, at least where the arraignment was "a critical stage in a criminal proceeding," because "What happens there may affect the whole trial." *Hamilton* v. *Alabama,* 368 U.S. 52, 54, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961). Four Justices of this Court (Chief Justice Warren and Justices Black, Douglas and Brennan) had expressed views indicating a belief that there was a right to counsel at interrogation, but a majority was not ready to go so far.

(c) *The Gideon period (1963-).*

In overruling *Betts,* Justice Black for the Court closed the circle by applying the principle of his own 1938 opinion of *Johnson* v. *Zerbst, supra,* to state proceedings. This Court in *Gideon* thus erased the fundamental distinction between the state and federal cases by holding that the Sixth Amendment guarantee of counsel was of such character that it applied to the states in full. The Court, readopting the conclusive authority of *Powell* v. *Alabama,* declared that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 372 U.S. at 344. Justice Douglas, concurring, noted that this did not mean that some kind of a watered-down version of the Sixth Amendment was made applicable to the states—its totality applied to both.

It follows that so far as the Sixth Amendment is concerned, after March 18, 1963, there is no difference between the right to counsel as provided in that Amendment in the two court systems. *Gideon* was followed shortly by *Haynes* v. *Washington,* 373 U.S. 503, 83 Sup. Ct. 1336, 10 L. Ed. 2d 513 (1963), holding that the failure to tell a defendant under interrogation that he is entitled to be represented by counsel is one of the factors relevant to determining whether his confession was voluntary, 373 U.S. at 516-17; and by *White* v. *Maryland,* 373 U.S. 59, 83 Sup. Ct. 1050, 10 L. Ed. 2d 193 (1963), which further extended the rule of *Hamilton* v. *Alabama.* In *White,* at a preliminary hearing, defendant pled guilty without counsel. Thereafter he was always afforded counsel. This Court held in effect that any stage at which a person can plead guilty is "critical" and he is entitled to counsel then.

C. Escobedo and the Present Day.

The welter of cases obscures the simple lines of the situation. As of the spring of 1963, this law applied to these situations:

1. Defendants were entitled to counsel at all trials in the federal courts under *Johnson* v. *Zerbst, supra.*

2. Defendants in state courts were entitled to counsel in all trials, *Gideon* v. *Wainwright, supra.*

3. Persons were entitled to counsel in all federal arraignments (Rule 5 of the Rules of Criminal Procedure, as repeatedly interpreted), and in all arraignments or analogous proceedings under state law at which anything of consequence can happen; *Hamilton* v. *Alabama, supra;* and *White* v. *Maryland, supra.*

4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it, at least in cases in which he wanted to consult his own lawyer; but this was not yet a majority view, *Crooker* v. *California, supra,* and *Cicenia* v. *La Gay, supra.*

5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. See for the views of Chief Justice Warren and Justices Black, Douglas, and Brennan, variously the *Groban, Crooker,* and *Cicenia* cases, *supra.*

Situation 5 is that presented in the instant case. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) settled point 4. In *Escobedo,* the defendant, after arrest but before indictment, repeatedly asked to see his counsel and was effectively barred from doing so by the

police. The Court held that it was immaterial whether the defendant had yet been indicted—"It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486. The Court, following the New York rule in *People* v. *Donovan*, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (1963) held that a confession even prior to indictment after an attorney had been requested and denied access to see the person, could not be used in a criminal trial.[10] Following the dissenting opinion of *In re Groban, supra*, the Court held that it would make a mockery of the right to counsel if a person were entitled to counsel at trial but not at an earlier stage which in truth disposed of the case. *Cicenia* and *Crooker*, after some attempt to distinguish them, were put aside with the observation that insofar as they might "be inconsistent with the principles announced today, they are not to be regarded as controlling." *Id.* at 492. In summary, *Escobedo* held: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Ibid.*[11]

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[10] This had special importance because of *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), holding that the states cannot, any more than the federal government, abridge the privilege against self-incrimination. Since a principal function of counsel is to advise a defendant of his constitutional rights, including specifically the right against self-incrimination, and since the most significant point of this abridgment is at the interrogation stage, *Malloy* buttressed the necessity of the right to counsel at this point.

[11] *Escobedo* further developed *Massiah* v. *United States*, 377 U.S. 201, 84 Sup. Ct. 1199, 12 L. Ed. 2d 246 (1964) an opinion by

We cannot in candor assert that *Escobedo* unequivocally establishes a right to counsel at the interrogation stage in all situations. Certainly, the three dissenting Justices so construed it, *Id.* at 496-97. On the other hand, any case may depend on its facts. In *Escobedo,* without doubt, the defendant did ask for counsel at the interrogation stage, this was denied him, and the Court did mention this as one of the factual elements in its decision. For an expression of honest puzzlement as to the scope of *Escobedo,* see *Miller* v. *Warden, Maryland Penitentiary,* 338 F. 2d 201, 204 (4th Cir. 1964).

Shortly before *Escobedo,* Justice Douglas, in discussing the need for counsel at the interrogation stage, said that "the federal law here is still halting or yet unborn." Douglas, *The Right to Counsel,* 45 Minn. L. Rev. 693-94 (1961). The new birth which Justice Douglas anticipated in 1961 has led to a nationwide series of conflicting decisions of which the instant case and *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), are typical. The Arizona Supreme Court in the instant case focused upon the fact that in *Escobedo,* the defendant asked for counsel whereas in the instant case, he did not, and therefore reached opposite

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Justice Stewart in which the defendant was induced to make statements, without counsel present, after his indictment. The Court adopted the rule that any "secret interrogation" after the indictment without the protection of counsel vitiated any confession so obtained. Three dissenting judges in *Massiah* thought that the reasoning of the case should apply equally to "statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not," 377 U.S. at 208; and in *Escobedo,* the majority took the view that no meaningful distinction can be drawn between interrogation of an accused before indictment or after. However, in *Escobedo* Justice Stewart expressed his own view that the fact of indictment "makes all the difference." 378 U.S. at 493.

results dependent upon that request. Chief Justice Traynor had already, before *Escobedo,* led the way toward a right to counsel at the interrogation stage in *People* v. *Garner,* 57 Cal. 2d 135, 18 Cal. Rptr. 40, 367 P. 2d 680, 693 (1961) (concurring). This landmark analysis put aside any distinction between a right to counsel after as distinguished from before indictment.[12]

The only difference between *Escobedo* and *Dorado* was that Dorado had neither retained nor requested counsel. The California court concluded that whether or not the accused had requested counsel was "a formalistic distinction." It read *Escobedo* to mean that defendant's right to counsel did mature at the accusatory stage; "the stage when legal aid and advice were most critical" to defendant; therefore California held that his vocalization of that right cannot be the determinative factor. 42 Cal. Rptr. at 175, with comprehensive citations following. Hence, California concluded that "the right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it." *Id.* at 176.

Indeed, there are numerous decisions of this Court holding that the right to counsel, where it indisputably exists, does not depend upon a request for it; see for example,

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[12] "It is a formalistic assumption that indictment is the point when a defendant particularly needs the advice and protection of counsel. Often a defendant is arrested under highly suspicious circumstances and from the time he is apprehended his guilt is a foregone conclusion in the minds of the police. Frequently too, suspicion falls upon him at some intermediate point before indictment. In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned. It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment than he is an hour after." 367 P. 2d at 695.

Carnley v. *Cochran,* 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962), holding with numerous citations that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." 369 U.S. at 513; and see, for post-*Gideon* application of this rule, *Doughty* v. *Maxwell,* 376 U.S. 202, 84 Sup. Ct. 702, 11 L. Ed. 2d 650 (1964). Relying on the *Carnley* opinion, the California court concluded that the presence or absence of the request was immaterial, a conclusion reached also because "we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." 42 Cal. Rptr. at 177-78. Hence, it held that at the interrogation stage a defendant must be informed of his rights so that he can intelligently waive them.

As noted, the cases have divided. *Wright* v. *Dickson,* 336 F. 2d 878, 882 (9th Cir. 1964) expressly holds that under *Escobedo,* the test is whether "the investigation was then no longer a general inquiry but had focused on appellant," and it is immaterial whether or not "appellant asked to consult retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact might bear upon waiver." See to the same effect, *United States ex rel. Russo*

v. *New Jersey*, 351 F. 2d 429, 438 (3d Cir. 1965);[13] and see the opinion of Tuttle, *J.*, in *Collins* v. *Beto*, 348 F. 2d 823, 830-31 (5th Cir. 1965), with abundant citations. See also, as an example of a state reversing itself to accord with this position, *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

Yet not only the instant case, but numerous others go the other way. See for example, *People* v. *Gunner*, 15 N.Y. 2d 226, 205 N.E. 2d 852 (1965), although Chief Judge Desmond and Judge Fuld disagree with that conclusion; see 205 N.E. 2d at 855-56. See also as illustrations of cases limiting *Escobedo* to its facts, *Latham* v. *Crouse*, 338 F. 2d 658 (10th Cir. 1964); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964); *United States* v. *Ogilvie*, 334 F. 2d 837 (7th Cir. 1964); *Mefford* v. *States*, 235 Md. 497, 201 A. 2d 824 (1964).[14]

D. The Right to Counsel at Interrogation: 1966.

The issue is whether, under the Sixth Amendment to the Federal Constitution as made applicable to the states by the Fourteenth, there is the same right to counsel at interrogation of an arrested suspect as there is at arraignment (*Hamilton* v. *Alabama, supra; People* v. *White, supra*) or

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[13] "No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver."

[14] For other cases to the same effect, see Note, *The Right to Counsel During Police Interrogation*, 25 Md. L. Rev. 165, 172, n. 58 (1965); and see Dowling, *Escobedo and Beyond*, 56 J. Crim. Law 143, 155, notes 81 and 82 (1965). Outstandingly useful articles relating to the problems of this case are Comments at 53 Calif. L. Rev. 337 (1965); 52 Geo. L.J. 825 (1964); 25 Md. L. Rev. 165 (1965); and 32 U. Chi. L. Rev. 560 (1965).

at trial (*Johnson* v. *Zerbst, supra; Gideon* v. *Wainwright, supra*).

The right does exist. It is the same. This is not the result of a single case, *Escobedo* or any other. Rather, there is a tide in the affairs of men, and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused. The *McNabb-Mallory* line of cases may in terms be restricted to the rules, but the rules themselves are a reflection of the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra.* Once the Sixth Amendment is clearly applicable to the states (*Gideon* v. *Wainwright*), then the constitutional standards are the same. *Escobedo,* although all that was involved there was a fact situation in which a request had been made and denied, necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment. Since *Carnley* v. *Cochran, supra,* bars unwitting waiver under the Sixth Amendment, it necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal.[15]

We have in this galaxy of cases not a series of isolated phenomena, but reflections of basic belief, beliefs which were expressed in the dissents in *In re Groban; Crooker;* and *Cicenia;* in *Gideon;* in *Malloy* v. *Hogan, supra,* extending the freedom from self-incrimination to the states; and in *Escobedo.* These are all different manifestations of the view expressed by Justice Douglas in *Culombe* v. *Connect-*

[15] For able development of a similar approach and view, see the dissenting opinion of Chief Judge Brune in *Prescoe* v. *State,* 231 Md. 486, 191 A. 2d 226, 232 (1963). We have not considered any of the problems of waiver or any of the problems of pre-arrest interrogation in this case since they are not here.

icut, supra, concurring, where he said, the "principle is that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal with fundamentals of liberty, and so, in consequence, with basic belief. The suggestion that the defendant must ask for counsel is to make a great matter depend upon a formal distinction. We warmly commend to this Court *Oregon* v. *Neely,* 239 Ore. 487, 398 P. 2d 482, 486 (1965):

> "Adoption of the distinction advanced by the state would lead to results contrary to the basic beliefs of the United States Supreme Court and of this court. . . . If the state's distinction were accepted, we would grant the assistance of counsel to those educated enough to demand it and deny it to those too ignorant to ask for it. The United States Constitution demands equal treatment during the criminal process for the inexperienced and the uneducated."

II.

Practical Considerations of Law Enforcement Accord With Giving the Sixth Amendment Its Full Meaning.

Whenever rights are recognized for those charged with crime, sincere people will inescapably be concerned as to the effect of those rights on law enforcement. In *Powell* v. *Alabama, supra,* the defendants were tried within a few days of the crime, and in holding that this matter had been hustled too much, this Court found it necessary to discuss

also the problem of the "great and inexcusable delay in the enforcement of our criminal law" as "one of the grave evils of our time." 287 U.S. at 59. In *Chambers* v. *Florida, supra,* the Court observed that "we are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws," 309 U.S. at 240, with a note analyzing the literature in relation to the use of the third degree to obtain confessions. Justice Jackson, in *Watts* v. *Indiana,* 338 U.S. 49, 57, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949) made the classic statement of the conflict:

> "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime . . . [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances." [16]

Justice White, dissenting for himself and Justices Clark and Stewart in *Escobedo,* expressed concern for the crippling effect of the decision on law enforcement, 378 U.S. at 499. Justice White, joined by Justices Clark and Harlan, in their dissent in *Massiah, supra,* also developed the matter largely in terms of the effect of the rule on law enforcement, moving from the premise that "a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it." 377 U.S. at 207.

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[16] Justice Jackson continued: "If the State may rest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guarantee of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government knows how helpless he is to protect his client against the facts thus disclosed." 338 U.S. at 59.

With so many members of this Court concerned with the constitutional rule from the practical standpoint of law enforcement, that matter requires independent consideration. The principal practical concerns are two: first, that the system established will be expensive; and second, that it will prevent the detection and punishment of the guilty. At a time when American society is deeply and justly concerned both with rising crime rates and with the menacing existence of organized crime, these are genuinely serious problems.

We begin by observing that the principles here advocated will have exactly zero effect on organized crime. This case involves an important constitutional principle, but it must not be made more important than it is. This case is not a grand caucus on whether sin or virtue should be the order of the day; we are dealing with the precise problem of whether a person charged with crime is to be made effectively aware of his right to counsel at the interrogation stage, and whether he is to be supplied counsel if he needs it at that point. None of this has any application to organized crime at all. The criminal gangs know perfectly well what tools, both physical and legal, they may use in their battle with society. The confession and right to counsel cases which have been before this Court so constantly since *Powell* v. *Alabama* have almost never involved gang-type criminals. The crimes from *Powell* (rape) to *Miranda* (rape) have almost always been rapes and murders, involving defendants poor, poorly educated, and very frequently, as here, of very limited mental abilities. The rich, the wellborn, and the able are adequately protected under existing constitutional standards, and the sophisticates of crime do not need this protection. We are talking here about precisely what was involved in *Chambers* v. *Florida*

twenty-five years ago, the "helpless, weak, outnumbered." 309 U.S. at 241.

A. Cost Factors.

Public defender systems cost money. Many defendants are indigents, and extending the right to counsel into the interrogation stage will increase personnel, paperwork, costs of all kinds. It will make some kind of public defender system virtually obligatory.[17] But the cost increase will by no means be limited to defense costs. As Mr. J. Edgar Hoover observed in 1952, full use of proper scientific methods should make it unnecessary for officers to use dishonorable methods of detection;[18] this inescapably means increased prosecution costs. A laboratory costs more than a strap, and so does the training of those who wield a microscope rather than a whip.

There are undoubtedly cheaper methods of law enforcement than those contemplated by the American Constitution. While some critics have contested the right to counsel in cost terms, no member of this Court has ever attempted to put a price tag on constitutional rights. Pepper in the eyes is cheaper than a fair trial and respect for constitu-

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[17] Pollock, *Equal Justice in Practice,* 45 Minn. L. Rev. 737, 738-39 (1961) estimates 2,000,000 arrests for major offenses in a year, with 1,000,000 needing free legal representation and only 100,000 getting it. Birzon, Kasanof and Forma, in *The Right to Counsel,* 14 Buff. L. Rev. 428, 433 (1965) estimate 65% to 90% indigency among felony defendants in New York. For brief references, see Note, 1962 U. Ill. L.F. 645, n. 37, and for more extensive citations on the burdens involved, Comment, *Escobedo* v. *Illinois,* 32 U. Chi. L. Rev. 560, 580, n. 92 (1965); and see for anticipated cost analysis under federal legislation, Rep. Emanuel Celler, *Federal Legis. Proposals,* 45 Minn. L. Rev. 697 (1961).

[18] FBI Law Enforcement Bull., Sept., 1952.

tional rights in law enforcement will inescapably cost money.

Let it.

B. The Effect on Law Enforcement.

Some members of this Court have had severe doubts about the effect of the application of these principles in the operation of the criminal law, and some outside criticisms have been uninhibited. Professor Inbau regards *Escobedo* as "the hardest body blow the Court has struck yet against enforcement of law in this nation." [19] More temperate criticism of *Escobedo* develops the view that it "creates unnecessary and undesirable impediments to police investigation." [20]

While figures vary as to the number of crimes which are solved by confessions, that number is clearly extremely large. As Justice Jackson observed in the passage quoted above from *Watts* v. *Indiana*, a lawyer at the interrogation stage may well tell his client to stand mute, and the practical effect will be to eliminate large numbers of confessions.[21]

There have been several congressional inquiries into the problems of police interrogation.[22] Professor Louis B.

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[19] As quoted in Dowling, *Escobedo and Beyond*, 56 J. Crim. L. 143, 145 (1965). Professor Inbau expresses himself also in *Restrictions in the Law of Interrogations and Confessions*, 52 Nw. U. L. Rev. 77 (1957).

[20] Enker and Elsen, *Counsel for the Suspect*, 49 Minn. L. Rev. 47, 48 (1965). See in particular, *Id.* at 62-63, n. 52, on the current developments under the English Judges' Rules.

[21] See Weisberg, "Police Interrogation of Arrested Persons," in *Police Power and Individual Freedom*. 153, 179 (Sowle Ed. 1962).

[22] See *Hearings on the Constitutional Aspects of Police Detention Before the Subcommittee on Constitutional Rights of the Senate*

Schwartz of the University of Pennsylvania has testified that in his experience, very few proper convictions had been lost because of the *Mallory* rule.[23] Senator Dominick noted the contradictory attitudes of the police and prosecutors as to the effect of the *Mallory* rule on the crime rate, with the police uniformly taking the position that the increase in crime in the District is directly related to the *Mallory* rule, while the United States Attorney and the Department of Justice indicate that the rule has very little effect on the releasing of guilty persons.[24]

Deputy Attorney General Ramsay Clark for the Department of Justice testified that the *Mallory* rule had not been

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Committee on the Judiciary, 85th Cong., 2d Sess. (1958) (hereafter, *1958 Hearings*). See also the various Hearings on bills to alter the rule of *Mallory* v. *United States, supra*. *E.g.*, *Hearings on H.R. 5688 and 5.1526 Before the Senate Committee on the District of Columbia*, 89th Cong., 1st Sess., pts. 1-2 (1965) (hereafter *1965 Hearings*). Prior to these Senate Hearings, the House Committee on the District of Columbia had submitted H.R. Rep. No. 176, 89th Cong., 1st Sess. (1965) (hereafter, *1965 Report*) to accompany H.R. 5688.

[23] *1965 Hearings*, pt. 1, at 107.

[24] *Id.* at 299. In earlier hearings, the Deputy Chief of Police for Washington, D.C., had contended that the *Mallory* rule results in freeing guilty persons and unduly hampers law enforcement, *1958 Hearings* 124-35. See also the testimony of Chief Layton, *1965 Hearings*, pt. 1, at 299.

The District Attorney of the District of Columbia, Mr. David Acheson, in 1964 said:

> " . . . Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain. . . . "

Quoted in the address of Judge J. Skelly Wright before the Annual Convention of the International Academy of Trial Lawyers, p. 10 (unpub., 1965), from which many of the conceptions of this brief are drawn.

shown to be a direct causative factor in crime or its increase; and the report of the United States Attorney attributes only two "lost" cases a year to the operation of the *Mallory* rule.[25] On the other hand, a report from the House Committee of the District of Columbia, H. Rep. 176, 89th Cong., 1st Sess. (1965) accompanying House Bill 5688, providing for amendment to the *Mallory* rule, does report an apparent relationship of the increase of the District of Columbia crime rate with *Mallory*.[26] A strong minority report shows that while there is a rise in crime in the District, nothing connects it to the *Mallory* rule or makes the rise attributable to *Mallory* in any way.[27]

There are other conflicting views. The New York City Police Commissioner in September of 1965 estimated that confessions were essential to conviction in 50 per cent of the homicides committed in New York in 1964 and, on the other hand, State Supreme Court Justice Nathan R. Sobel describes the view that confessions are the backbone of law enforcement as "carelessly nurtured nonsense."[28] New York District Attorney Frank S. Hogan says that the police are heavily dependent on confessions to get convictions in many cases and that "the whole purpose of a police investigation is frustrated if a suspect is entitled to have a lawyer during preliminary questioning, for any

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[25] For Mr. Clark's statement, see *id.*, pt. 2, at 495; for that of Mr. Acheson, see note 36, *infra*.

[26] *1965 Report* 5. There is some testimony to the effect that it is very difficult to obtain convictions of criminals where neither scientific evidence nor eye witness identification is available. *Id.* at 65.

[27] *Id.* at 119.

[28] *New York Times*, Nov. 20, 1965, p. 1. Judge Sobel's views are published in N.Y.L.J., Nov. 22, 1965, p. 1, 4-5, and have very comprehensive statistics on various crimes and their relation to confessions.

lawyer worth his fee will tell him to keep his mouth shut." [29] On the other hand, Brooklyn District Attorney Aaron E. Koota believes that a person should have a lawyer "at the moment he comes into contact with the law." While some law enforcement officials claim that 75 to 85 per cent of all convictions are based on confessions, Judge Sobel's study, based on 1,000 Brooklyn indictments from February to April, 1965, showed that fewer than 10 per cent involved confessions.[30]

An extremely experienced point of view is that of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit, who resigned from the Michigan Supreme Court to be Detroit Police Commissioner in 1962 and 1963. Judge Edwards said, "We did take prisoners promptly before a judge. And the town did not fall apart. Murder and pillage did not run rampant." He added that he had attempted to run the Detroit Police Department by United States Supreme Court standards, and that it made law enforcement more effective, convincing more people that "we were moving toward making it more nearly equal in its application to all people, regardless of race or color." [31]

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. Sec. 3006A, reflects the belief that early advice of right to counsel is compatible with good law enforcement. The Congressional Committee considered a report of the special committee of the Association of the Bar of the City of New York and of the National Legal Aid Association, which con-

[29] *New York Times*, Dec. 2, 1965, p. 1.

[30] *New York Times*, Nov. 22, 1965, p. 1, pt. 2.

[31] *New York Times*, Dec. 7, 1965, p. 33.

cluded that the public defender "system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal."[32] The Congress was also advised of the report of the Attorney General's Committee on Poverty and Administration of Federal Justice, February 25, 1963. This report in turn referred to the 1958 report of the New York City Bar and National Legal Aid Association Committee, asserting that "if the rights of the defendant are to be fully protected, the defense of his criminal case should begin as soon after the arrest as possible." A majority of the Attorney General's Committee endorsed this view, and recognized "strong argument that the time the defendant needs counsel most is immediately after his arrest and until trial."[33]

The Attorney General's Committee "after careful consideration" did not adopt that view for legislative purposes at that time but the actual bill which passed provides that the United States Commissioner for the Court should advise the defendant of his right to be represented by counsel and in appropriate circumstances should appoint counsel for him. 18 U.S.C. Sec. 3006A(b). Coupled with the *Mallory* rule, this for all practical purposes means forthwith advice of the right to counsel almost at once upon arrest.

The District of Columbia is the best testing ground for the effect of the Court's standards since it has been most affected by the *McNabb-Mallory* line of cases and at the same time is most analogous to the states of any part of the federal system. The leading study is *Report and Recom-*

[32] Hearing Before Senate Committee on the Judiciary on S. 1057, p. 24 (1963).

[33] *Id.* 197-205.

mendations of the Commissioner's Committee on Police Arrests for Investigation (1962), commonly known as the Horsky Report, for its chairman, Mr. Charles A. Horsky. The Horsky study shows that a very large number of arrests for investigation have been made in the District of Columbia, the number of persons being arrested on suspicion running about a third of those arrested for felonies.[34] An analysis of hundreds of cases of arrest for investigation, in which persons were interrogated privately, showed that this was not in fact a fruitful source of criminal convictions; only about five per cent were ever charged, and even this exaggerates the practical importance of the procedure.[35] As noted, the former United States Attorney, Mr. David Acheson, reported that only an average of about two cases a year were lost because of the *Mallory* decision.[36]

The Horsky Report is the richest single source on the practical aspects of secret interrogations. On both principle and practical considerations "the committee recommends that arrest for 'investigation' should cease immediately."[37] They invoked directly the principle of Blackstone's Commentaries:

> "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so

[34] Horsky Report, p. 9. For comparable Chicago experience, with statistical detail on the numbers of persons detained for investigation, see American Civil Liberties Union "Secret Detention by the Chicago Police" (Free Press, Glencoe, Ill., 1959). Based on a study of police records, the report concludes that in 1956 approximately 20,000 persons were held incommunicado for at least 17 hours, and 2,000 for 48 hours or more.

[35] Horsky Report, pp. 33-34.

[36] Horsky Report, p. 17.

[37] Horsky Report, pp. 41-71.

gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to a gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." [38]

As a practical matter, we cannot know with assurance whether the amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions.[39] The best of interrogation, as expounded for example by the principal publicist for secret inquiries, Professor Inbau, makes a poor case for itself as is illustrated in the note attached.[40] But assuming that there may be some unpredictable decline in the efficiency of

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[38] Quoted at Report, p. 43.

[39] See for example the conflict between Inbau, *Police Interrogation—a Practical Necessity, in Police Power and Individual Freedom,* 147 (Sowle ed. 1962) with Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View, id.,* 153.

[40] The following note is taken bodily from Comment, *The Right to Counsel During Police Interrogation,* 53 Cal. L. Rev. 337, 351-52, note 75 (1965):

"75. See Inbau & Reid, *Criminal Interrogation and Confessions* (1962); Kidd, *Police Interrogation* (1954); Gerber & Schroeder, *Criminal Investigation and Interrogation* (1962). The Inbau and Reid book is a very specific and highly illuminating study of recommended techniques of interrogation. A paraphrase of the author's advice to the would-be interrogator might read: Impress the accused with your certainty of his guilt, and comment upon his psychological symptoms of guilt, such as the pulsation of a carotid artery, nail biting, dryness of the mouth, etc.; smoking should be discouraged because this is a tension-reliever for the guilty subject trying desperately not to confess; the sympathetic approach—anyone else under such circumstances would have acted the same way, suggests a less repulsive reason for the crime, and, once he

the conviction machinery, there are some distinctly practical plusses to be balanced against this. As Justice Douglas said in *United States* v. *Carignan*, 342 U.S. 36, 46, 72 Sup. Ct. 97, 96 L. Ed. 48 (1951), when a person is detained without arraignment,

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confesses, extract the real reason, condemn the victim, the accomplice or anyone else upon whom some degree of moral responsibility might be placed; understanding approach—a gentle pat on the shoulder, a confession is the only decent thing to do, I would tell my own brother to confess; forceful approach—exaggerate the charges against the accused, sweet and sour technique (one policeman is hostile to him while other acts as his friend); interrogation of the recalcitrant witness—at first be gentle and promise him police protection, then, if he still refuses to talk, attempt to break the bond of loyalty between him and the accused or even accuse him of the offense and interrogate him as if he were the offender.

"The book written by Lt. Kidd provides fascinating reading for the novice. The following paraphrased extracts offer examples: The officer should not interrogate in a business office where there might be a recording device because he may make some statements which would be embarrassing if played back in court to rebut his testimony; feed upon suspect's likes and dislikes—love of mother, hatred of father, concern for children; never release pressure even when tears begin to flow; don't allow the accused any form of tension release at a critical moment in the questioning, such as a cigarette, a drink of water, or a trip to the washroom; play two co-conspirators against each other (often termed bluffing on a split pair)—claim that one talked and blamed the other, possibly using a false recording to substantiate this claim, continually take one out separately but never question him—the other will believe it necessary to tell his side of the story; aggressive approach—blame accused for crimes he didn't commit, play on the fact that many defendants fear the mental asylum more than jail.

"An interesting article in the Gerber and Schroeder book noted the similarity between the methods of interrogation used today and the practices of the German Inquisition. See Gerber & Schroeder, *op. cit. supra* at 361-62."

See also, for illustration of interrogation methods, Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21, 31-32 (1965).

> "the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient."

We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.[41]

Moreover, some of the cost and efficiency comes from giving American citizens exactly what they are entitled to under the Constitution. It is, after all, the man's privilege to be silent, *Mallory* v. *Hogan, supra,* and it does smack of denial of equal protection to say that this is a right only for those well educated enough to know about it. But one need not reach to constitutional principle; there are, practically, equally important workaday considerations. As is well developed by Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125, 129 (D. Conn. 1960):

> "Statements elicited during questioning are bound to be colored to some extent by the purpose of the questioner who inevitably leads the witness in the absence of court control. This coloring is compounded where the statement is not taken down stenographically, but written out as a narrative in language supplied by the ques-

[41] "The 'war on crime' is not a sporadic crisis, here today and gone tomorrow, justifying during its brief combat stage a shelving of long-standing immunities of the citizen." Sutherland, *supra,* n. 40, 79 Harv. L. Rev. at 40-41, supported by contemporary illustrations; and see citations collected in the Horsky Report, pp. 46-47.

tioner. Where the state of mind of the defendant is an issue in the case, as in determining the degree of a homicide, this wording of his account of the crime is of vital importance. . . . Had counsel been available to Reid he might have advised Reid of the danger to one on trial for his life on charges such as were faced by Reid of adopting the language of another in a statement signed by him.

"Reid appears to have been suggestible, as might be expected in view of his age, mentality and education." [42]

Judge Smith's highly practical observations are of special application in the instant case. We deal here with rape and with what is, on the facts, an actual issue of penetration.[43] This defendant was obviously led in his alleged talk about vagina and penis, and had he not made or acquiesced in this very clearly led statement, might have been convicted for a lesser offense.

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[42] We are not unaware that this case was reversed on other grounds, three to two by the Second Circuit, Judges Clark and Waterman dissenting on the issue of rehearing, 295 F. 2d 83 (2d Cir. 1961) and that certiorari was denied, 368 U.S. 948, 82 Sup. Ct. 390, 7 L. Ed. 2d 344 (1962). We respectfully commend it as a good case all the same.

[43] Without the "half-inch" statement in the confession (R. 69), there might have been no rape in this case at all. There was no medical testimony of any rape. In response to the prosecution's questions, the prosecutrix testified that at first the defendant was unable to make penetration; that later he did, but whether with his finger or his penis, she "was not sure" (R. 19). A few lines later, she said he made penetration with his penis (R. 20); but on cross, in response to the question of whether entry had been made "with his finger or his penis," she replied, "I don't know" (R. 32), and later she said, "I guess it was with his penis" (R. 33).

Conclusion

The day is here to recognize the full meaning of the Sixth Amendment. As a matter of constitutional theory and of criminal procedure, if a defendant cannot waive counsel unwittingly in one part of the conviction procedure, he should not be able to waive it at another. As a matter of practicality in law enforcement, we cannot know the precise effects of giving counsel at the beginning as the law does at the end; but we can know that there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect just after it is too late to matter. Yet that is precisely the *Miranda* case.

We invoke the basic principles of *Powell* v. *Alabama*: "He requires the guiding hand of counsel at every step in the proceedings against him." When Miranda stepped into Interrogation Room 2, he had only the guiding hand of Officers Cooley and Young.

We respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By JOHN P. FRANK*
JOHN J. FLYNN

January, 1966.

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* Counsel notes with appreciation the research assistance of Mr. Robert Jensen of the Minnesota bar and Mr. Paul Ulrich of the California bar, both clerks in the office of counsel.